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No. 108, Original

In The Supreme Court
Of The United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defendant.

WYOMING MEMORANDUM IN OPPOSITION TO PLATTE RIVER TRUST AND NATIONAL AUDUBON SOCIETY MOTIONS FOR LEAVE TO INTERVENE

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INTRODUCTION

The Platte River Whooping Crane Critical Habitat Maintenance Trust ("Platte River Trust") and the National Audubon Society ("Audubon") have moved for leave to intervene as parties plaintiff to enforce and modify this Court's Decree in *Nebraska v. Wyoming*, 325 U.S. 665 (1945), as modified , 345 U.S. 981 (1953) ("North Platte Decree"). They seek to modify the North Platte Decree to require Wyoming to deliver a "regulated flow of water at the Wyoming-Nebraska state line" to meet the "downstream river flow needs of migratory bird habitat" in eastern Nebraska. Platte River Trust Motion for Leave to Intervene as Plaintiff, at 1, Complaint in Intervention, at 7, and Memorandum in Support of Motion to Intervene, at 13, 19-20; Audubon Brief in Support of Motion for Leave to Intervene, etc., at 10, n.10. Because their asserted interests and positions appear to be essentially identical, and in the interests of brevity, Wyoming responds

to the motions of the Platte River Trust and Audubon together.

Original jurisdiction proceedings concerning the apportionment of interstate waters involve the sovereign states in their role as *parens patriae*. Of course, there are many important and diverse interests within each state, but an adjudication of those competing interests is not the role of this Court. Rather, its role is to achieve an equitable adjustment of the sovereign rights of the states as necessary to prevent the actions of one state from causing serious injury to another. The need to provide an adequate forum for that purpose is paramount over conflicting considerations supporting intervention by private parties in other types of proceedings. Even if the Platte River Trust and Audubon could demonstrate that they meet the technical requirements of the Federal Rules of Civil Procedure for intervention in proceedings subject to those rules, their intervention or participation as litigants here would not be appropriate. For this and other reasons summarized hereafter, Wyoming requests the Court to deny the motions to intervene, including the alternative motion of Audubon for leave to participate as litigating *amicus curiae*.

ARGUMENT

I. INTERVENTION BY THE PLATTE RIVER TRUST AND AUDUBON WOULD ENLARGE THE SCOPE OF THIS PROCEEDING AND THE RELIEF REQUESTED AGAINST WYOMING.

The Platte River Trust apparently misunderstands the nature of this proceeding. It asserts that it is both

for the enforcement and for the modification of the North Platte Decree. *See, e.g.*, Platte River Trust Memorandum in Support of Motion, at 1. This proceeding, as framed by the pleadings of the parties, is for the enforcement of the existing North Platte Decree, not for its modification. Nebraska has expressly disclaimed that it seeks to "modify the Decree in any respect". Nebraska Reply to Wyoming Brief in Opposition to Motion for Leave to File Petition, at 2. None of the parties seeks to modify the Decree.

The Platte River Trust and Audubon seek to modify the North Platte Decree to require Wyoming to deliver North Platte River flows at the state line in accordance with an annual schedule which they claim is needed for migratory bird habitat in eastern Nebraska.[1] The migratory bird habitat for which they seek regulated flows is located on the Platte River downstream of the confluence of the North Platte River and the South Platte River. The habitat area is more than 230 miles downstream from the Wyoming-Nebraska state line.

[1] A question exists as to whether the Platte River Trust has authority to attempt to intervene in this proceeding at all. The Trust Declaration creating the Trust provides: "No part of the activities of this Trust shall be the participation in, or intervention in . . . any litigation other than litigation directly related to the administration of the Trust." The Platte River Whooping Crane Habitat Maintenance Trust Declaration, at 9. *See, generally*, G. Bogert, *Law of Trusts* § 163A (5th ed. 1973). It is unclear whether the Trust, if granted intervention, intends to attack or merely enforce the Grayrocks Reservoir Settlement Agreement pursuant to which it was created. Platte River Trust Memorandum in Support of Motion to Intervene, at 14-15. Surely the Trust is not authorized to attack the very agreement creating it nor to argue that operation of Grayrocks Reservoir in accordance with the agreement injures the Trust's or Nebraska's rights.

The North Platte Decree apportions water to Nebraska only for the benefit of certain specified irrigation canals diverting at or above Tri-State Dam, which is located in Nebraska a short distant downstream of the Wyoming-Nebraska state line.[2] The North Platte Decree does not provide for or contemplate the delivery of "regulated flows" for any uses supplied by diversions below Tri-State Dam. The Court found that return flows and local supplies were adequate for such downstream uses. *Nebraska v. Wyoming*, 325 U.S. 589, 607, 654 (1945).

Intervention by the Platte River Trust and Audubon would greatly enlarge the scope of this proceeding and the relief requested against Wyoming. For example, the North Platte Decree expressly does not affect the apportionment of the South Platte River between Colorado and Nebraska made by the South Platte River Compact.[3] North Platte Decree, Para. XII(e). If this Court is to determine in this proceeding whether the North Platte Decree shall be modified to provide water for migratory bird habitat in eastern Nebraska, then equity surely would require that the Court also consider whether Colorado and Nebraska have responsibility to supply water for that purpose from the South Platte River. Equity also would

[1] V. The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five per cent to Wyoming and seventy-five percent to Nebraska. . . . North Platte Decree, Para. V.

[2] Nor does it affect "[t]he apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River." North Platte Decree, Para. XII(d).

require the Court to consider whether operation of diversion and storage projects in Nebraska, such as Lake McConaughy (Kingsley Dam), should be modified to assure delivery of regulated flows for migratory bird habitat.[4]

Audubon makes clear that its purpose in participating in this case is to protect the migratory bird habitat from further depletions in Wyoming and to secure regulated flows for the habitat through enforcement of the Endangered Species Act, 16 U.S.C. §§ 1531, *et seq.* Audubon assumes that the Secretary of Interior will fail to carry out his duties under that Act. Of course, any such failure would be subject to judicial review in the United States District Courts. 16 U.S.C. § 1540(c). There is no merit to the assertion that the Endangered Species Act properly can be applied in a proceeding such as this involving equitable apportionment of interstate waters between sovereign states. The Act's mandate extends to federal actions, including the operation of federal programs, and to any actions constituting takings of threatened or endangered species. No such actions are involved in this proceeding. The point is that Nebraska does not claim such relief here. This is not a suit to enforce the Endangered Species Act. To permit the Platte River Trust or Audubon to intervene for that purpose would enlarge the relief claimed against Wyoming.

This proceeding, as it stands, is one to determine whether certain actions or proposed actions in the North Platte basin in Wyoming, and Nebraska violate

[4] Because of its location between the Wyoming-Nebraska state line and the habitat area, no "regulated flows" delivered at the state line from Wyoming could reach the habitat area without passing through Lake McConaughy (1.9 million acre-feet capacity).

the existing North Platte Decree. Intervention by the Platte River Trust or Audubon would transform the proceeding into one involving the relationship between the migratory bird habitat in eastern Nebraska and water uses in the entire North Platte, South Platte and Platte River basins upstream in the three states. That relationship involves extremely complex and disputed scientific, factual matters. Those matters, including a determination of the water requirements for the migratory bird habitat, would necessitate extensive evidentiary proceedings which would dominate these proceedings in terms of time and expense.

II. CONSIDERATIONS OF *PARENS PATRIAE* AND SOUND JUDICIAL ADMININSTRATION IN THIS UNIQUE PROCEEDING OVERRIDE ANY REASONS FOR INTERVENTION.

We are unable to find a single case where this Court has permitted a party other than a state or the United States to intervene in an original jurisdiction action for the equitable apportionment of interstate waters. There are sound reasons why the Court has consistently limited participation in such actions. Equitable apportionment proceedings in the exclusive original jurisdiction of this Court are unique because their purpose is to make complex adjustments of the conflicting soverign interests of states:

> [W]henever . . . the action of one State reaches through the agency of natural laws into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them, and this Court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them. . . . If the two states were absolutely independent nations it would be settled by treaty or by force. Neither of these ways being practicable, it must be settled by decision of this Court.

Kansas v. Colorado, 206 U.S. 46, 97-98 (1907). In such proceedings, each state is deemed to represent all of its citizens. *New Jersey v. New York*, 345 U.S. 369, 372 (1952); *Nebraska v. Wyoming*, 295 U.S. 40, 43; 325 U.S. 589, 616, 629 (1945).

As this Court observed in *New Jersey v. New York*:

> The principle [of *parens patriae*] is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration. Otherwise, a State might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties.

345 U.S. at 373. There, Philadelphia was denied leave to intervene for the purpose of protecting its water supply from the Delaware River because Pennsylvania was already a party and Philadelphia was unable to show a "compelling interest" that was not properly represented by the State.

The interests of the Platte River Trust and Audubon in securing instream flows in the Platte River for

migratory bird habitat are not necessarily paramount to or more compelling than other water interests represented by Nebraska. Such other interests include instream flows for other purposes, as well as conflicting diversion to supply municipal, industrial, agricultural and other uses. The interest of the Platte River Trust and Audubon in this proceeding is certainly not more compelling than Philadephia's was in *New Jersey v. New York, supra*. Philadelphia's water supply was threatened by New York's proposed diversion. It is difficult to imagine an interest more direct and compelling than that. Certainly, Philadelphia's interest in protecting its municipal water supply was exclusive and different from other water users in Pennsylvania. Yet it was not allowed to intervene because the state represented its interests *parens patriae*. The Platte River Trust and Audubon simply are not able to show that they have a protectable interest in this proceeding that is so different from other Nebraska water interests that it cannot be represented adequately by Nebraska.

The Platte River Trust and Audubon seek to have this Court in effect allocate water among competing interests within Nebraska. The Court has declined to get involved in such intrastate allocation, confining itself to determination of the relative rights of the States. *United States v. Nevada*, 412 U.S. 534, 538 (1973); *Nebraska v. Wyoming*, 325 U.S. 589, 627 (1945). In fact, the North Platte Decree itself expressly provides that it does not affect the relative rights of water users within the respective states. North Platte Decree, Para. XII(a). In the first proceeding in *Nebraska v. Wyoming*, 295 U.S. 548 (1935), the Court denied the Platte Valley Public Power and Irrigation District's motion to intervene. It was the sponsor of the Kingsley Dam (Lake McConaughy) and one of the major water

users on the North Platte River in Nebraska, as is its successor the Central Nebraska Public Power and Irrigation District.

If the Platte River Trust or Audubon were permitted to intervene, the Court could then be required to evaluate all of the competing water interests within the individual states. As this Court recognized in *New Jersey v. New York*, 345 U.S. 369, 373 (1953):

> If we undertook to evaluate all the separate interests within Pennsylvania, we could, in effect, be drawn into an intramural dispute over the distribution of water within the Commonwealth. . . . Our original jurisdiction should not be thus expanded to the dimensions of ordinary class actions.

Moreover, the interests of sound judicial administration dictate against using this Court's original jurisdiction to undertake an unwieldly, complex interstate and intrastate adjudication of conflicting claims to water in the entire Platte River basin. *Cf. Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 504-05 (1971). Determination of the relative rights of the states acting *parens patriae* for all of their water interests is stress enough on the Court's original jurisdiction.

Other adequate and more appropriate forums exist in which the Platte River Trust and Audubon may participate to insure that the Endangered Species Act is properly enforced. The Act itself provides for lower federal court jurisdiction over suits by citizens to require the United States to comply with the Endangered Species Act and to otherwise enforce the provisions of the Act. 16 U.S.C. § 1540. Wyoming submits

that the Court should dispose of the motions to intervene here as it did Morton International, Inc.'s motion in *Utah v. United States*, 394 U.S. 89, 96 (1969):

> While Morton doubtless wishes to have us settle its additional claims, we decline to permit intervention for the sole purpose of permitting a private party to introduce new issues which have not been raised by the sovereigns directly concerned. We are thus constrained to require the company to seek another forum which may, with greater efficiency, hear and decide its claims, together with any defenses the sovereign concerned wishes to interpose.

The Platte River Trust points out that private parties have been permitted to intervene in other original jurisdiction proceedings. None of those cases, however, was an original jurisdiction proceeding for the apportionment of interstate waters or for enforcement of an equitable apportionment decree. In *Arizona v. California*, 460 U.S. 605 (1983), the Court permitted the Indian Tribes to intervene. But there, the action was brought for the adjudication of the Tribes' federal reserved water rights and the Tribes were the sole claimants of the water rights for omitted lands and boundary lands. No other claims were before the Court. The suit to modify the decree was brought on their behalf by the United States, and their intervention did not enlarge the claims or issues.

The Platte River Trust and Audubon rely principally on *Maryland v. Louisiana*, 451 U.S. 725 (1981), where seventeen natural gas pipeline companies were

permitted to intervene in an original jurisdiction suit challenging Louisiana's tax on certain natural gas production. The companies were found to have a direct stake in the controversy because the tax in question was imposed on them directly as owners of the gas. *Id.* at 745, n.21. The companies were more directly affected by the tax in question than the consumers represented by the plaintiff states *parens patriae*. In contrast, the Platte River Trust and Audubon have no stake in the existing controversy, since the apportionment under the existing North Platte Decree which Nebraska seeks to enforce is limited to the irrigation canals diverting at or above Tri-State Dam. Even if the suit here were for modification of the Decree, the Trust and Audubon have no more direct stake in the controversy than does any other particular water interest in Nebraska. Their interests therefore are required to be represented by Nebraska *parens patriae*. Moreover, in *Maryland v. Louisiana*, intervention by the pipeline companies did not raise new claims or issues, since all of the parties were challenging the same tax.[5]

The Platte River Trust also relies on *Kentucky v. Indiana*, 281 U.S. 163 (1930), as authority for the intervention standard in original jurisdiction cases. That case did not involve intervention at all. The individual citizens of Indiana were defendants, not applicants for intervention. The issue was whether relief should be granted against them as well as the State of Indiana in the original jurisdiction suit filed by Kentucky. The Court held that relief against those defendants was not proper and dismissed the com-

[5] That decision did not compromise the state's sovereign immunity protected by the Eleventh Amendment. *Arizona v. California*, 460 U.S. 605, 614 (1983). *See* Argument, Part III.

plaint as against them because Indiana represented their interests *parens patriae*. *Id.* at 173-75. Therefore, the only relevance of *Kentucky v. Indiana* here is that a state shall represent all of its citizens *parens patriae* in original actions.

The other cases on which the Platte River Trust and Audubon rely do not support the intervention requested here. *Oklahoma v. Texas*, 258 U.S. 574 (1922), was essentially a quiet title action where the private parties allowed to intervene claimed title to the very property that was in the exclusive possession of the Court. In *Utah v. United States*, 394 U.S. 89, 92 (1969), intervention was denied in "the interests of justice and sound judicial administration". The Court noted that intervention by one party would lead to many others, "greatly increasing the complexity of this litigation". *Id.* at 95-96. That same concern is pertinent here. *Trbovich v. United Mine Workers*, 404 U.S. 528 (1972), was not an original jurisdiction case, and the Secretary of Labor there was not acting in a *parens patriae* role comparable to a state's role in an equitable apportionment proceeding. *Texas v. New Jersey*, 379 U.S. 674 (1965), involved the intervention of another state and so did not address the problems raised by intervention of a private party.

III. THIS COURT'S ORIGINAL JURISDICTION DOES NOT EXTEND TO THE CLAIMS ADVANCED BY THE PLATTE RIVER TRUST AND AUDUBON.

To permit intervention of the Platte River Trust and Audubon would be tantamount to creating a private right of action for equitable apportionment in the original jurisdiction. There can be no doubt that

those parties could not invoke this Court's original jurisdiction in the first instance to assert the claims set forth in their respective complaints. They cannot evade the constitutional and self-imposed limitations of this Court's original jurisdiction by asserting the claims as intervenors in Nebraska's suit for enforcement of the North Platte Decree. They admit that they are seeking relief not claimed by any other party to this proceeding.[6] Platte River Trust Memorandum in Support of Motion at 13, 20; Audubon Brief in Support of Motion, at 10.

The exclusive original jurisdiction of the Court is invoked in this case because there is a dispute between the states over enforcement of the North Platte Decree. U.S. Const., art. III, § 2, cl. 2. There is no dispute before the Court among the states and the United States regarding enforcement of the Endangered Species Act or regarding whether the North Platte Decree should be modified to provide regulated flows for the migratory bird habitat. The claims of the Platte River Trust and Audubon lie elsewhere than in this Court's original jurisdiction because, being asserted by private parties, they are outside the scope of Article III, Section 2, of the Constitution.

Even where this Court has original jurisdiction, it has used restraint in exercising that jurisdiction. The Court's self-imposed restraints extend even to exclusive original jurisdiction cases. R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice*, Para. 10.6 (6th ed. 1986); *Massachusetts v. Missouri*, 308 U.S. 1 (1939) (Fac-

[6] Neither Nebraska nor the United States requests modification of the North Platte Decree or delivery of regulated flows. The Answer of the United States herein states that "[a]ny modification of the decree should accommodate the habitat requirements of migrating birds. . .", at 3.

tors considered in restraint of exercise of original jurisdiction include (1) availability of another forum, (2) magnitude of the sovereign interest affected, (3) impact on the Supreme Court's workload and resources); *United States v. Nevada*, 412 U.S. 534 (1973) (Availability of another forum and non-existence of a dispute between the states was ground for denying leave to file complaint). These same considerations should compel the Court to deny these motions to intervene, which seek to expand the original jurisdiction to new parties and new claims. *Utah v. United States*, 394 U.S. 89 (1969).

Finally, the Eleventh Amendment of the United States Constitution precludes the Platte River Trust and Audubon from asserting the claims set forth in their tendered complaints. In *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100-101 (1984), this Court presents a detailed discussion of its cases construing and applying the Eleventh Amendment and concludes:

> It is clear, of course, that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment. [Cites omitted]. This jurisdictional bar applies regardless of the nature of the relief sought. See, e.g., *Missouri v. Fiske*, 290 U.S. 18, 27 (1933) ("Expressly applying to suits in equity as well as at law, the Amendment necessarily embraces demands for the enforcement of equitable rights and the prosecution of equitable remedies when these are asserted and prosecuted by an individual against a State").

The Court also held that claims otherwise barred by the Eleventh Amendment could not be asserted in a federal court on the theory that they are ancillary to other properly asserted claims holding that,

> "The Eleventh Amendment is an explicit limitation of the judicial power of the United States." *Missouri v. Fiske*, 290 U.S. at 25. It deprives a federal court of power to decide certain claims against States that otherwise would be within the scope of Art. III's grant of jurisdiction.

Id. at 119-120.

This action by its very nature is one against the state in its sovereign capacity. Since the Platte River Trust and Audubon, if permitted to intervene, would "bring new claims or issues" against Wyoming, their intervention is precluded by the Eleventh Amendment. *Arizona v. California*, 460 U.S. 605, 614 (1983).

IV. RULE 24 OF THE FEDERAL RULES OF CIVIL PROCEDURE DOES NOT REQUIRE THE COURT TO PERMIT INTERVENTION HERE.

The Federal Rules of Civil Procedure do not bind this Court but may be taken as a guide where their application is appropriate. SUP. CT. R. 9.2. Even if FED. R. CIV. P 24 were controlling, the Platte River Trust and Audubon have not demonstrated that they have a protectable interest in this proceeding which would be impaired and which cannot be adequately represented by the existing parties.

As Judge Friendly observed in *United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 983 (2d Cir. 1984), application of Rule 24 requires "that its com-

ponents be read not discretely, but together," and "with an eye to the posture of the litigation at the time the motion is decided." *Id.* He notes also that "[t]he rule was designed with the more traditional private action in mind, and its adaptation to other contexts requires a flexible reading of its provisions." *Id.* Perhaps more importantly, he noted that the current Rule 24 rejects "formalistic restrictions in favor of 'practical considerations' to allow courts to reach pragmatic solutions to intervention problems." *Id.* Here, practical considerations dictate that intervention be denied.

Since intervention by the Platte River Trust and Audubon is precluded for the purpose of asserting claims or issues different from those asserted by the other parties, they are left in the position of having to justify their intervention to assert the same claims as Nebraska for enforcement of the North Platte Decree, and must show why Nebraska should not stand in judgment for them under the doctrine of *parens patriae*. This they have failed to do.

Nebraska has demonstrated its willingness and ability to represent the interest of the migratory bird habitat in Nebraska. In fact, Nebraska filed a lawsuit to enjoin construction of the Grayrocks Reservoir on the Laramie River in Wyoming on the ground, *inter alia*, that the federal permitting agencies failed to consider effects of the project on the habitat. *Nebraska v. Rural Electrification Administration*, 12 ERC 1156 (D. Neb. 1978). Nebraska was aligned with Audubon in that litigation. The litigation resulted in the Settlement Agreement which created the Platte River Trust.

The Platte River Trust and Audubon have also assumed, without basis, that the United States will fail

to carry out its obligations under the Endangered Species Act and cannot adequately represent their interest in the migratory bird habitat. This Court has recognized that Congress' imposition of diverse obligations on a federal agency is no impediment to the agency's ability to carry out those obligations. *Nevada v. United States*, 463 U.S. 110, 128 (1983) (U.S. Department of Interior represented interests of both Indian Tribes and water users under a Bureau of Reclamation project in adjudication of water rights).

Where governmental entities are already parties to an action in their *parens patriae* role, a private party seeking to intervene must demonstrate "a strong showing of inadequate representation". *United States v. Hooker Chemicals & Plastics Corp., supra*, at 985-87. Even if this were an action to modify the North Platte Decree, the Platte River Trust and Audubon's assertions regarding inadequate representation are not sufficient. They are outweighed by the strong considerations in favor of limiting participation in equitable apportionment proceedings to sovereigns.

In summary, intervention by these parties and the attempted intervention by other parties that would follow would greatly increase the scope and the expense of the proceeding. The proceeding and its attendant uncertainty would be prolonged, to the prejudice of the existing parties. Wyoming submits that the Platte River Trust and Audubon do not meet the requirements of the Federal Rules of Civil Procedure for intervention in proceedings subject to those rules. But even if they did, their intervention or participation as litigants here should not be permitted. The proceeding for apportionment of the North Platte River was initiated in 1934. The North Platte Decree

was entered in 1945, eleven years later. Wyoming has a strong interest in a more expeditious resolution of the issues now before the Court regarding enforcement of the Decree.

CONCLUSION

For the foregoing reasons, the motions should be denied.

Respectfully submitted,

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